UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 99-5617 and 99-5853

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NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

LINDA LEWIS AND ROGER WEEKLY, INDIVIDUALLY AND AS A PARTNERSHIP, d/b/a/ IRON GRIDDLE RESTAURANT

Respondent/Cross-Petitioner

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ON APPLICATION FOR ENFORCEMENT
AND CROSS-PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the application of the National Labor Relations Board ("the Board") to enforce the order it issued against Linda Lewis and Roger Weekly, individually and as a partnership, d/b/a/ Iron Griddle Restaurant ("the Employer"). The Board's order issued on March 31, 1999, and is reported at 327 NLRB No. 205. (A 11-18.)[1] The Employer has cross-petitioned for review of the Board's order. (A 9-10.)

[1] "A" refers to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a))("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. The Board's jurisdiction is uncontested. This Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practice occurred in Waynesburg, Pennsylvania. The Board's order is properly appealable because it is a final order under Section 10(f) of the Act (29 U.S.C. § 160(f)). The Board filed its application for enforcement on August 20, 1999; the Employer filed its cross-petition for review on September 9, 1999. The application for enforcement and cross-petition for review were timely; the Act places no time limit on such filings. (A 1-10.)

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Employer violated Section 8(a)(1) of the Act by threatening to discharge employee Lynette Ferrari and by telling an employee that Ferrari had been discharged because she threatened to contact the Board.

2. Whether substantial evidence supports the Board's finding that the Employer violated Section 8(a)(1) of the Act by discharging employee Ferrari because she engaged in protected concerted activity.

STATEMENT OF THE CASE

This case was before the Board upon the filing of unfair labor practice charges against the Employer by Lynette Ferrari. (A 327.) After an investigation of those charges, the Board's General Counsel issued a complaint alleging that the Employer had violated the Act. (A 331-339.) Following a hearing, an administrative law judge issued a decision sustaining the complaint allegations. (A 15-18.) The Employer filed exceptions and a supporting brief with the Board, attacking, among other things, the basis of one of the judge's credibility findings. The Board found merit in that exception and issued an order remanding the case to the administrative law judge for reconsideration of his credibility finding in light of certain evidence and for preparation of a supplemental decision. (A 14-15.) Pursuant to the Board's order, the judge issued a supplemental decision and reaffirmed his initial credibility finding. (A 12-13.) The Employer again filed exceptions and a supporting brief. On March 31, 1999, the Board issued a decision and order affirming the decision of the administrative law judge. (A 11.) This proceeding followed.

I. THE BOARD'S FINDINGS OF FACT

A. Background

In May 1995, Linda Lewis and Roger Weekly, as partners, purchased and continued operation of the Iron Griddle Restaurant. Lewis, as general manager, assumed operational control, including financial authority, and she managed the day shift. Weekly managed the restaurant's evening shift. (A 15; 211, 256, 293.)

Initially, the partners made few changes in the operation of the restaurant. The operational hours, from 6 a.m. to 9 p.m., and the menu remained the same and the partners operated with the same staff of about 18 employees working basically three overlapping shifts. (A 128, 131, 151, 175.)

Lynette Ferrari was among the waitresses employed at the restaurant when Lewis and Weekly took control. Ferrari worked exclusively on the early morning shift. As a regular on that shift, Ferrari was among the waitresses responsible for preparing the restaurant for its 6 a.m. opening. To do this, Ferrari typically reported to work around 5:30 a.m. to make coffee, heat syrup, put out creamers, and perform other setup duties. The Employer's practice was not to pay waitresses for work time that was spent before the restaurant's 6 a.m. opening. (A 15-16; 33-36, 123-124.)

In February 1996, the Employer installed a time clock in the restaurant. Lewis did not allow Ferrari or the other morning shift waitresses to punch in until 6 a.m., even though they began

their preparation work before that time. Shortly after the installation of the time clock, Ferrari asked Lewis to allow the employees to punch in before 6 a.m. so that they would get paid for the time spent on preparation. In response, Lewis said that she would "figure something out." (A 37.) A short time later, Lewis informed the morning shift waitresses that they could punch in as early as 5:45 a.m. Despite this agreement, the Employer continued to pay waitresses only from the restaurant's opening at 6 a.m. (A 38, 39, 125, 128, 129, 161.)

B. Ferrari Complains to General Manager Lewis about the Employer's Failure to Pay Employees for Preopening Setup Time; on that Same Day the Employer Threatens and Discharges Ferrari

On January 22, 1997, Ferrari overslept. Her husband, Dennis Ferrari, telephoned the restaurant at about 5:25 a.m. and told Malva Custer, the head waitress, that Ferrari would be a little late. (A 16; 139, 145.) Custer said that would not be a problem. (A 16; 139.)

Ultimately, Ferrari arrived at the restaurant some three to five minutes late, and Lewis angrily criticized her. (A 16; 39-40, 64.) Shortly thereafter, Ferrari telephoned her husband. She told him about Lewis' reaction to her coming in late and asked what had happened when he had reported that she would be late. Dennis Ferrari said that Custer had said it would not be a problem. (A 16; 40-41, 64.)

Later that morning, Dennis Ferrari came by the restaurant and attempted, without success, to meet with Lewis about how she had

handled Lynette's late arrival. Lewis refused to discuss the matter and escorted him out of the restaurant. (A 16; 145.)

Ferrari continued working during and after her husband's visit to the restaurant. At about 12:45, Ferrari approached Custer to tell her that she needed to leave promptly at 1 p.m.--at the end of her shift--because she had someplace to go. Custer said that would not be a problem. (A 16; 44, 67, 314.)

Ferrari left the restaurant at 1 p.m. and went to the Pennsylvania State Unemployment Office to seek advice on the waitresses' right to compensation for work time spent preparing for the restaurant's opening. That agency referred Ferrari to other government agencies, including the Board, for further assistance. (A 16; 44-45.)

Ferrari returned home and contacted the Board's regional office in Pittsburgh. Afterwards, she telephoned coworker Phyllis Steves. Ferrari told Steves, who had been off work that day, about Lewis' reaction to her being a few minutes late that morning. Ferrari also told Steves that she thought Lewis' reaction to her being late was extreme, especially since Lewis was not paying her for any setup time. Ferrari said that she thought the situation was unfair and that she had contacted the unemployment compensation agency and the "Labor Relations Board." She said that the waitresses had the right to demand compensation and that they could not be fired for doing so, so long as at least two waitresses were involved. (A 16; 69.) Ferrari asked

Steves if she wanted to join her in her effort to get compensation for their preparation time. Steves agreed to join Ferrari. Steves told Ferrari that, while she would not be at work tomorrow, Ferrari could tell Lewis that she supported the demand. (A 16; 46, 127.)

Ferrari reported to work as usual on January 23. (A 16; 46.) At about 6:30 that morning, Ferrari approached Lewis and told her that she and Steves would like to talk to her about getting paid for the 15 minutes they spent each day preparing the restaurant for opening. Lewis asked Ferrari who had told her to start work early. Ferrari replied that Lewis had. Lewis stated that she was not "playing games," and she said to Ferrari, "If you want to push this, I will lay you off." Ferrari persisted and stated again that she and Steves wanted to be paid for their 15 minutes of setup time. Lewis told Ferrari that she would talk to Ferrari and Steves individually, but not to them together. Lewis also repeated, "I do mean it Lynn, if you want to push this, I will lay you off." At that point, Ferrari returned to her waitress duties. (A 16; 46-47, 280-281, 283.)

At about 12:50 p.m., Head Waitress Custer approached Ferrari and asked her to report to Lewis' office. Ferrari reported to the office and found Lewis together with Custer and another supervisor, Thelma Jackman. (A 16; 72.) Lewis told Ferrari that she was being terminated immediately. Ferrari said okay and proceeded to leave. Lewis told Ferrari that she wanted her to

know why she was being terminated. Ferrari said that she knew why. Lewis told her she was being terminated because of her husband and because coworkers could not work with her. Ferrari responded by telling Lewis she wanted it noted that she and Steves wanted their money. (A 16; 48, 49.)

C. Supervisor Custer Tells Another Employee that Ferrari Was Discharged Because She Threatened to Complain to the Board

About January 29, waitress Dorothy Welsh spoke to Custer in the employee breakroom. Welsh asked Custer why Ferrari had been fired. Custer told Welsh that Ferrari had been fired because of her husband's visit to the restaurant on January 22, and because Ferrari had threatened to go to the "Labor Relations Board." (A 17; 176-177.)

After her discharge, Ferrari was initially awarded unemployment compensation benefits by the Pennsylvania Office of Employment Security. The Employer appealed that determination and a hearing was held before a referee of the Pennsylvania Unemployment Compensation Board of Review ("the UCB"). On April 25, the referee issued a decision affirming the award of benefits to Ferrari. (A 371-373.) The Employer appealed the referee's decision to the UCB panel; it reversed the referee's award. Ferrari appealed that determination to the Commonwealth Court of Pennsylvania, and that appeal was denied. (A 11, 12, 14, 17; 19-23, 371-376.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Truesdale and Members Fox and Hurtgen), in agreement with the administrative law judge, found that the Employer violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by telling an employee that Ferrari was discharged for contacting the Board, by threatening to discharge Ferrari, and by discharging Ferrari because she engaged in protected and concerted activities. (A 11, 13, 18.)

The Board's order requires the Employer to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 18.) Affirmatively, the order requires the Employer to offer Ferrari reinstatement, to make her whole for any losses suffered, and to post copies of a remedial notice. (A 18.)

STATEMENT OF RELATED CASES

This case has not previously been before this Court. Apart from the state unemployment compensation proceeding discussed below, Board counsel are not aware of any other related case or proceeding that is completed, pending, or about to be presented to this Court, any other court, or any state or federal agency.

STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); Universal Camera

Corp. v. NLRB, 340 U.S. 474, 493 (1951); NLRB v. Public Serv. Elec. and Gas Co., 157 F.3d 222, 228-230 (3d Cir. 1998)(Board's "factual determinations are entitled to a substantial degree of deference"). The Board's reasonable inferences are entitled to acceptance on review, "even if the court would have drawn a different inference had it been deciding the case de novo." D&D Distribution Co. v. NLRB, 801 F.2d 636, 641 (3d Cir. 1986).

A reviewing court will uphold the Board's credibility findings if the Board considers "all relevant factors" and "sufficiently explains" its findings. North Cambria Fuel Company, Inc. v. NLRB, 645 F.2d 177, 180 (3d Cir.), cert. denied, 454 U.S. 1123 (1981). See also NLRB v. Louton, Inc., 822 F.2d 412, 414 (3d Cir. 1987)(Board's credibility findings are entitled to "great deference").

SUMMARY OF ARGUMENT

As the Employer does not contest the Board's finding that it violated Section 8(a)(1) of the Act by threatening to discharge Ferrari because of her protected concerted activity and by telling another employee that Ferrari was discharged because she threatened to complain to the Board, the Board's uncontested findings are entitled to summary affirmance.

Substantial evidence supports the Board's finding that the Employer violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging employee Ferrari because of her protected concerted activity. The inference of unlawful

motivation is supported by the uncontested violations of the Act, the timing of the discharge on the day that Ferrari spoke with Lewis about the Employer's failure to pay her and another employee for setup time, and the pretextual nature of the Employer's explanation for the discharge.

The Board did not abuse its discretion by rejecting the Employer's contention that the Board should have deferred to the UCB's decision as to the basis for Ferrari's discharge. The Board also acted within its discretion in denying as untimely the Employer's motion to admit the transcript of that proceeding into the Board's unfair labor practice proceeding.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE EMPLOYER VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING TO DISCHARGE EMPLOYEE LYNETTE FERRARI AND BY TELLING AN EMPLOYEE THAT FERRARI HAD BEEN DISCHARGED BECAUSE SHE THREATENED TO CONTACT THE BOARD

The Employer does not contest the Board's finding that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening to discharge Ferrari because of her protected concerted activity and by telling another employee that Ferrari was discharged because she threatened to complain to the Board. Accordingly, affirmance of those uncontested findings, and summary enforcement of the related portions of the Board's order, are required. See NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1125 (3d Cir. 1982); NLRB v. Atlas Microfilming, 753 F.2d 313,

320 (3d Cir. 1985).[2] Those uncontested violations do not disappear, however, simply because the Employer has not challenged them. They survive, "lending [their] aroma to the context in which the [remaining] issues are considered." NLRB v. Clark Manor Nursing Home, 671 F.2d 657, 660 (1st Cir. 1982). Accord U.S. Marine Corp. v. NLRB, 944 F.2d 1305, 1315 (7th Cir. 1991) (en banc); NLRB v. Frigid Storage, Inc., 934 F.2d 506, 509 (4th Cir. 1991).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE EMPLOYER VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEE FERRARI BECAUSE SHE ENGAGED IN PROTECTED CONCERTED ACTIVITY

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to engage in concerted activities, not only for self-organization, but also "for the purpose of . . . mutual aid or protection." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) protects these Section 7 rights by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce

[2] The Employer merely refers (Br 18-22, 25-26) to the Board's two findings, without making any arguments with respect to those findings. The Employer's mere reference to the findings is insufficient to constitute a challenge to them on review. See Sitka Sound Seafoods, Inc. v. NLRB, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (where an employer's opening brief "merely refer[red] to [an] argument" without actually arguing the point, the employer waived its right to raise the argument and could not raise the argument in its reply brief). Moreover, even assuming that the Employer's references to those findings could be construed as a challenge to the credibility determinations supporting them, we show below that all of the Employer's challenges to the Board's credibility determinations are entirely without merit.

employees in the exercise of the rights guaranteed in [S]ection 7 . . . ." Accordingly, an employer violates Section 8(a)(1) by discharging an employee for engaging in concerted activities protected under the Act. See NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1348 (3d Cir. 1969), cert. denied, 397 U.S. 935 (1970); Eisenberg v. Lenape Prod., Inc., 781 F.2d 999, 1004 (3d Cir. 1986).

It follows that the critical question in a case involving a contested discharge is the motive for the employer's action. See NLRB v. Eagle Material Handling, Inc., 558 F.2d 160, 169-170 (3d Cir. 1977). In NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination cases first articulated by the Board in Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 89 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Under that test, if substantial evidence supports the Board's finding that unlawful considerations were a "motivating factor" in an employer's discharge of an employee, the Board's finding that the discharge was unlawful must be affirmed unless the record compelled the Board to accept the employer's affirmative defense that the employee would have been discharged even in the absence of her protected activity. See NLRB v. Transportation Management

Corp., 462 U.S. 393, 397, 401-403 (1983); NLRB v. Omnitest Inspection Services, 937 F.2d 112, 122 (3d Cir. 1991).

If the record supports the Board's finding that the reason advanced by the employer did not exist, or that the employer did not in fact rely upon that reason, then the reason is simply a pretext and there is no remaining basis for finding that the employer would have taken the adverse action even in the absence of the employee's protected concerted activity. See Painters Local 277 v. NLRB, 717 F.2d 805, 812 (3d Cir. 1983); Wright Line, 251 NLRB at 1084.

As motive is a question of fact, "the Board may look to both direct and circumstantial evidence to determine whether an unlawful motive exists." Systems Management, Inc. v. NLRB, 901 F.2d 297, 306 (3d Cir. 1990); accord NLRB v. Scott Printing Corp., 612 F.2d 783, 787 (3d Cir. 1979). The Board may rely upon such factors as the employer's expressed hostility towards the protected activities; the timing of the discharge; and the implausibility of the employer's asserted reasons for its actions. NLRB v. Omnitest Inspection Services, 937 F.2d at 122; Hunter Douglas, Inc. v. NLRB, 804 F.2d 808, 814 (3d Cir. 1986), cert. denied, 481 U.S. 1069 (1987); Herman Bros., Inc. v. NLRB, 658 F.2d 201, 210 (3d Cir. 1981).

B. Substantial Evidence Supports the Board's Finding that the Employer Discharged Ferrari Because of Her Protected Concerted Activity

1. There is compelling evidence that Ferrari's protected concerted activity was a powerful motivating factor in the Employer's decision to discharge her

The evidence on which the Board based its decision that the Employer unlawfully discharged Ferrari is, for the most part, uncontroverted. In particular, it is undisputed that Ferrari was engaged in protected concerted activity when she complained about nonpayment for preopening setup time, and that on the same day that she complained, the Employer threatened and then discharged her. We show below that, based on that record evidence, the Board reasonably found that Ferrari's discharge was motivated by her protected concerted activity.

As shown above, at 6:30 a.m. on January 23, Ferrari approached Lewis about not being paid for preopening setup time. Ferrari also told Lewis that she had enlisted an ally to her cause, coworker Steves, and that the two of them wanted to speak jointly to Lewis about their compensation. Lewis reacted immediately to this turn of events. Stating that she was "not playing games," Lewis bluntly warned Ferrari that she would be laid off if she pressed the issue. When Ferrari repeated that she and Steves wanted to discuss their pay, Lewis flatly stated, "I do mean it Lynn, if you want to push this, I will lay you off." Hours later, at the end of Ferrari's shift, Lewis informed Ferrari that she was discharged.

As the Board found (A 16), the timing of Ferrari's discharge --only a few hours after she pressed the employees' pay demand-- raises the specter of an unlawful motive. Indeed, the timing between the two events is so close as to render the Employer's unlawful motive "stunningly obvious." NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982). Accord NLRB v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivating factor.").

Equally telling of the Employer's unlawful motive is its contemporaneous commission of other unfair labor practices. Those unfair labor practices take on added significance in this case because they consist of a threat and a statement specifically targeting Ferrari precisely because she asserted rights protected by the Act. Indeed, as just shown, the threat was particularly telling--Lewis explicitly threatened to lay off Ferrari for pressing the pay issue, and then actually discharged her only a few hours later. Simply put, Lewis made an unlawful threat and then swiftly executed it. Accordingly, Lewis' threat is especially powerful evidence of an unlawful motive. See Herman Bros., Inc. v. NLRB, 658 F.2d 201, 210 (3d Cir. 1981) (quoting NLRB v. Ferguson, 257 F.2d 88, 89 (5th Cir 1958))("[U]ncontested, independent violations of § 8(a)(1) . . . convey the 'unmistakable overtone of a purpose to discriminate and retaliate because of . . . [the protected activity].'"). Accord NLRB v. Rubber Rolls, Inc., 388 F.2d 71, 74 (3d Cir. 1967)

(substantial evidence of unlawful motive existed where the employer twice threatened employee with discharge if he persisted in protected concerted activity).

2. The Employer's explanation of its decision to discharge Ferrari was false and pretextual

As we now show, the Employer defended its decision to discharge Ferrari by offering a false and pretextual explanation that buttressed the Board's finding of an unlawful motive. See Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966) (An employer's proffering a false explanation permits the Board to infer that his real motive "is one that the employer desires to conceal--an unlawful motive--at least where . . . the surrounding facts tend to reinforce that inference."). Accord Property Resources Corp. v. NLRB, 863 F.2d 964, 967 (D.C. Cir 1988); NLRB v. American Spring Bed Mfg. Co., 670 F.2d 1236, 1245 (1st Cir. 1982).

Here, the Employer argues (Br 40) that it decided upon Ferrari's discharge on January 22, the day before Ferrari pressed Lewis about the pay issue. The Employer cites (Br 9-12) a variety of matters related to Ferrari's work performance, but it claims (Br 16-17, 40, 46-48, 53, 55, 57) that the event that triggered her discharge was an alleged act of insubordination on January 22--namely, Ferrari's alleged refusal to meet with Lewis at the end of her shift. Lewis testified (A 270, 273, 285) that she sought the January 22 meeting because she intended to reprimand Ferrari in writing for certain work-related problems,

but that Ferrari's refusal to attend the meeting was "insubordination" and the "final straw" that caused Lewis to rethink the reprimand and fix upon Ferrari's discharge.

The Board discredited Lewis' testimony, finding (A 12) that the alleged act of insubordination did not happen. As shown below, the Board's credibility determinations are fully supported by demeanor considerations as well as the Board's reasoned analysis of the testimony in light of other record facts.

Initially, as the Board found (A 16), the Employer's witnesses did not credibly establish that Ferrari refused to meet with Lewis on January 22. Thus, Lewis and Head Waitress Custer testified that, at Lewis' request, Custer asked Ferrari to meet with Lewis at 1 p.m., the end of Ferrari's work shift. Ferrari, however, credibly denied that Custer made such a request. On the contrary, Ferrari credibly testified that, at about 12:45, she asked for and received permission from Custer to leave promptly at the end of her shift at 1 p.m. As the Board found (A 12, 16), Ferrari's demeanor was credible and her testimony was corroborated by the testimony of former cashier Heidi Conrad, who overheard Ferrari ask for and receive permission from Custer. As the Board also found (A 12, 16), Conrad's testimony was highly credible because, as a former employee who left her employment voluntarily, she had "no apparent stake in the outcome of this case." See NLRB v. Steinerflim, Inc., 669 F.2d 845, 849 (1st Cir. 1982) (corroboration by neutral witness warranted the

Board's crediting of the General Counsel's witnesses over the employer's two witnesses).

As the Board also pointed out (A 12, 17), Lewis' own records undermined her claim that Ferrari's alleged insubordination played a role in her discharge. The Employer's Exhibit 18 (A 400-401), which purports to be Lewis' notes of the infractions she intended to cover in her January 23 discharge interview with Ferrari, does not mention any insubordination on January 22 as a reason for the discharge. Seeking to explain that omission, Lewis asserted (A 296, 299) that discussing the alleged insubordination with Ferrari was "moot" by the time of the interview because, once she decided to discharge Ferrari rather than reprimand her, she was no longer interested in correcting Ferrari's behavior. In discrediting this strained explanation, the Board noted (A 16) that, by that criteria, all the other infractions listed in Lewis' notes were also moot. Indeed, if mootness had been a consideration, Lewis would not have met with Ferrari on January 23 and volunteered, even in the face of Ferrari's expressed disinterest (A 48-49, 169-171, 268), the purported reasons for her discharge.

As the Board noted (A 16), the Employer's insubordination claim is also suspect because the Employer failed to raise it on the form it filed with the UCB prior to the hearing on Ferrari's claim for unemployment benefits. That form (A 377-378), filed by the Employer to defend itself against Ferrari's claim, called for

the Employer to "explain fully the circumstances which provoked the discharge." The form provided a space for listing the "ACTIONS [THAT] CAUSE[D] THE CLAIMANT'S SEPARATION," a separate space for incidents of "MISCONDUCT," and an additional space for "VIOLAT[IONS] OF ANY COMPANY POLICIES OR PROCEDURES." (A 377-378.) In the spaces provided, Lewis cited numerous reasons for Ferrari's discharge. She even cited the visit by Ferrari's husband to the restaurant on January 22, although, before the Board, her counsel claimed that the incident was not very significant. (A 16.) Nonetheless, despite the opportunities, Lewis did not make even a passing reference to insubordination or to Ferrari's failure to meet with Lewis.

The Employer's feeble answer to that glaring omission is to assert (Br 40-43) that Lewis had too little space on the form to state all the reasons for Ferrari's discharge. However, this ignores the bold warning that heads the form: "USE EXTRA SHEET IF NECESSARY FOR FURTHER EXPLANATION OR OTHER REASONS." Indeed, if Lewis missed that warning, it is paraphrased and reprinted above the form's closing line that bears her signature. (A 377-378.) The Employer's answer also ignores its principal claim that Ferrari's asserted insubordination was not simply another reason for Ferrari's discharge; it was the ultimate reason.

Seeking to bolster its defense, the Employer cites (Br 53, 57) the testimony of Lewis and her partner, Weekly, who claimed that they made the decision to discharge Ferrari on January 22.

The Board, however, had several highly persuasive reasons for discrediting their claim that they made the decision that day. In the first place, as the Board pointed out (A 12, 17), Weekly did not call Ferrari at home on the evening of January 22 to tell her that she was discharged, even though he conceded that he had previously called other employees at home to discharge them. Equally important, Lewis did not tell Ferrari that she was discharged when she appeared for work the next morning, on January 23. Indeed, as the Board found (A 12), Lewis and Weekly "offered no plausible explanation for allowing Ferrari to work the entire next day if the discharge decision had been made" the day before. As the Board further found (A 12), Lewis failed to explain why she admittedly discussed the pay issue with Ferrari on January 23, if she and Weekly had already decided to discharge her.[3]

The Board also reasonably found (A 12, 16) implausible Lewis' testimony that Ferrari's pre-January 23 conduct had moved Lewis to prepare a written reprimand that she intended to give Ferrari

[3] The Employer's contention (Br 62) that it withheld notifying Ferrari of her discharge because it could not find a replacement does not withstand scrutiny. The Employer offered no evidence of any replacement that it even tried to contact. The Employer's explanation is also suspect because of Lewis' own testimony concerning the meeting she allegedly sought with Ferrari at the end of her shift on January 22. Thus, Lewis claimed (A 285) that she would have discharged Ferrari on January 22, if Ferrari had met with her and rejected the written reprimand that Lewis allegedly intended to give her. In short, Lewis claimed that she was prepared to dispense with Ferrari's services on January 22. It is, thus, not plausible for Lewis to claim that she was not prepared to handle Ferrari's absence on January 23.

at the meeting Lewis allegedly sought with her on January 22. As the Board pointedly observed (A 11, 12, 16), the Employer could not produce a copy of the alleged reprimand at the hearing; Lewis claimed that she had thrown it away. Lewis' claim that she wrote the reprimand and then threw it away is simply not plausible, however. As the Board pointed out (A 17), "[L]ewis kept everything else associated with Ferrari's employment," including "every note she had made concerning" Ferrari's work performance. Given those circumstances, the Board reasonably found (A 17) that Lewis did not write a reprimand on January 22.

Having failed to prove the existence of that reprimand, the Employer cites (Br 9, 11-12 nn.3-5) the other notes in Ferrari's employment file, claiming that it had become progressively dissatisfied with Ferrari's behavior at work. The notes, however, are of little value in proving that claim. None of the listed incidents resulted in any actual disciplinary measures against Ferrari. (A 286.) Indeed, only a few reports (A 241-255, 286, 383-401) were significant enough to prompt management to even raise the matter with Ferrari. Under the circumstances, the Board

reasonably viewed this evidence as part of "[the Employer's] attempt to portray Ferrari's entire employment history in as unfavorable [a] light as possible." See NLRB v. Permanent Label Corp., 657 F.2d 512, 515 (3d Cir. 1981) (inference of unlawful

motive proper where employer had not reprimanded employee or given him notice of problems that purportedly led to discharge).

The Board explicitly recognized (A 17) that Ferrari might not have been a faultless employee. The Board also found (A 17; 257), however, that the Employer had tolerated those faults throughout her employment until January 23--the day that Ferrari engaged in protected concerted activity. See Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1352 (3d Cir. 1969) ("It may be that neither [of the discharged employees] was an ideal or even acceptable employee, but the policy and protection of the [Act] do not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate."), cert. denied, 397 U.S. 935 (1970). See also NLRB v. Challenge-Cook Bros. of Ohio, 374 F.2d 147, 151-152 (6th Cir. 1967).[4]

The cases cited by the Employer (Br 59-60) do not require the Court to reject the Board's credibility findings or its finding of unlawful motive. For example, in Desert Construction, Inc., 308 NLRB 923, 923, 927 (1992), cited by the Employer (Br 59-60), the Board found that the alleged discriminatee, Northcutt, was

[4] Contrary to the Employer's contention (Br 47), its failure to take adverse action against Steves even though she was implicated in the protected activity is not significant. It is well settled that adverse actions may be unlawful whether or not all participants in protected activity suffer at once. See Birch Run Welding & Fabricating v. NLRB, 761 F.2d 1175, 1180 (6th Cir. 1985); Merchants Truck Line, Inc. v. NLRB, 577 F.2d 1011, 1016 (5th Cir. 1978). Accord NLRB v. Instrument Corp. of America, 714 F.2d 324, 330 (4th Cir. 1983) (an unlawful motive "'is not disproved by an employer's proof that it did not weed out all'" the employees engaged in protected activity (citation omitted)).

not a credible witness and credited the employer's witnesses. Their testimony established that the employer's president decided upon Northcutt's discharge only after he was told about Northcutt's "continuing performance and attitude problems," and the employer's prior unsuccessful efforts to correct those problems. Id. Here, the credited evidence does not show that the Employer discharged Ferrari because of her job performance or that it had tried unsuccessfully to correct her job performance. Similarly, Aroostook County Opthamology v. NLRB, 81 F.3d 209, 214 (D.C. Cir. 1996), cited by the Employer (Br 60), has no bearing on this case. The issue in that case was whether the employees' discussion of working conditions in front of patients was activity protected by the Act.

Finally, the Employer repeatedly claims (Br 26, 27, 38, 48, 64) that the administrative law judge's credibility determinations and his other findings were the result of bias. That claim should be rejected because "[i]t is well-established that, in order to establish judicial bias, there must be evidence of an extrajudicial source of bias or a deep-seated antagonism to the complaining party." Calex Corp. v. NLRB, 144 F.3d 904, 910 (6th Cir. 1998). Accord Liteky v. United States, 510 U.S. 540, 556 (1994). Here, the Employer has produced no such evidence. Rather, the Employer merely suggests (Br 40) that the judge must have been biased because he discredited all of its witnesses with respect to the central factual disputes. It is settled, however,

that bias is not established "'merely because an [administrative law judge] uniformly credits one party's witnesses over another's.'" NLRB v. So-White Freight Lines, Inc., 969 F.2d 401, 408 n.7 (7th Cir. 1992) (citation omitted). Accord NLRB v. Pittsburgh Steamship Co., 337 U.S. 656, 659 (1949) ("total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact").

In sum, viewing all the evidence, the Board was warranted in finding that the Employer's defense was a pretext to disguise its true, unlawful motive--that is, that it discharged Ferrari because of her protected concerted activity.

C. The Board Acted Within Its Discretion In Refusing to Defer to the Decisions of the UCB and the State Court

As noted, the UCB and the state court ruled against Ferrari on her claim for unemployment benefits arising from her discharge. The Employer contends (Br 30-40) that the Board was bound by those rulings under the principle of common law preclusion. As a general matter, that principle holds that, "'[w]hen an issue of fact or law is actually litigated and determined by a final and valid judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties . . . .'" NLRB v. Yellow Freight Systems, Inc., 930 F.2d 316, 319 (3d Cir. 1991) (citation omitted) ("Yellow Freight"). As we now show, the Employer's contention should be rejected.

Initially, the Employer's contention fails because of Section 10(a) of the Act (29 U.S.C. § 160(a)). That section gives the Board the exclusive power to prevent unfair labor practices, and it further provides that the Board's power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . . ." See Yellow Freight, 930 F.2d at 321 (Section 10(a) embodies "a federal policy to ensure the ability of the [Board] to remedy unfair labor practices"). See generally Motor Coach Employees v. Lockridge, 403 U.S. 274, 276 (1971) (the Board's exclusive jurisdiction over unfair labor practices "preempts state . . . jurisdiction to remedy conduct that is arguably protected [by Section 7] or prohibited by [Section 8] of the Act"); Garner v. Teamsters Union, 346 U.S. 485, 490-491 (1953) (In adopting the Act, Congress "did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply laws generally to the parties. It went on to confide primary interpretation and application of its rules to [the Board]," in order to avoid "incompatible or conflicting adjudications" by a "multiplicity of tribunals.").

Given its exclusive jurisdiction to prevent unfair labor practices, the Board is not bound by the determinations made in state unemployment proceedings. See NLRB v. Stafford Trucking, Inc., 371 F.2d 244, 249 (7th Cir. 1966), and cases cited (since "original jurisdiction under [the] Act has been committed by

Congress exclusively to the Board," the Board "does not give binding weight to unemployment compensation rulings" of state agencies). See also NLRB v. Tennessee Packers, Inc., 339 F.2d 203, 204 (6th Cir. 1964) (a state agency's ruling denying unemployment benefits "is in no way controlling" on the determination "of the same factual issue" in the unfair labor practice proceeding); NLRB v. Pacific Intermountain Express Co., 228 F.2d 170, 176 (8th Cir. 1955) (Board was not bound by a state agency's decision denying unemployment benefits, even where a state court had affirmed that decision; the Board "is entitled to make its own decision on the evidence before it"), cert. denied, 351 U.S. 562 (1956); Garrison Valley Center, Inc., 277 NLRB 1422, 1422 n.1 (1985) (Board found that state agency's ruling denying unemployment benefits was not controlling, and that Board's decision must be based on "'an independent consideration and evaluation of the evidence received'" in the unfair labor practice hearing (citation omitted)); Bolsa Drainage, Inc., 242 NLRB 728, 728 n.1 (same).[5]

Nevertheless, the Employer cites (Br 30) Yellow Freight, 930 F.2d at 321, where this Court addressed the issue of common law

[5] Of course, as the Board pointed out in this case (A 14), evidence with respect to state unemployment compensation proceedings is admissible and is given appropriate consideration in Board proceedings. See Garrison Valley Center, Inc., 277 NLRB at 1422 n.1 (Board admitted decision of state unemployment compensation agency into evidence). Here, the Board gave the UCB and state court rulings appropriate consideration, but reasonably found that the great weight of the evidence showed that Ferrari's discharge was unlawfully motivated.

preclusion. In that case, an arbitrator had ruled that an employee had assaulted a supervisor and that, therefore, the employer had just cause under the contract for discharging him. Id. at 318. On appeal, a state court affirmed that decision. Id. Thereafter, in the unfair labor practice proceeding, the Board discredited the employer's testimony that the employee had assaulted the supervisor, finding instead that the employee was unlawfully discharged for engaging in protected activity. Id. at 318-319.

On appeal, this Court pointed out that the Board had applied its well-established deferral policy, which provides that the Board will defer to an arbitrator's award only if "the proceedings appear to have been fair and regular, all parties have agreed to be bound, the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act, and the arbitrator has adequately considered the unfair labor practice issue." Id. at 321. As the Court also pointed out, the employer conceded that deferral was inappropriate because the arbitrator "never considered" the unfair labor practice issue. Id. at 322. In spite of that concession, the Employer claimed that--in considering the merits of the unfair labor practice issue--the Board should be required under common law preclusion principles to accept the arbitrator's specific factual finding that the employee had assaulted the supervisor. Id. The Court, however, concluded that "much of the evidence" relevant to that

factual issue had never been presented to the arbitrator, and that, accordingly, there was no basis for binding the Board to the arbitrator's finding. Id. Given that conclusion, the Court deemed it unnecessary to decide "whether the Board would ever be bound as a matter of common law preclusion to defer to an arbitrator's factual findings." Id.

Here, like the employer in Yellow Freight, the Employer urges the Court to find that common law preclusion principles estop the Board from disturbing the findings made in an earlier proceeding. To support its position, the Employer claims (Br 30-31) that the state unemployment compensation proceedings in this case are analogous to the arbitration proceedings in Yellow Freight. As the Court's analysis in Yellow Freight readily shows, however, the Employer's claim is fundamentally flawed.

To begin with, the Court in Yellow Freight explicitly recognized that Section 10(a) of the Act (29 U.S.C. § 160(a)) gives the Board the exclusive power to prevent unfair labor practices. Id. at 321. As the Court also recognized, the Board has carved out an exception to that exclusive power by "voluntarily and as a matter of its own discretion" adopting its policy of deferring to the decisions of arbitrators if those decisions satisfy certain carefully defined standards. Id. As the Court was careful to point out, the Board adopted its deferral standards to accommodate an important, long-standing labor policy--namely, the "national labor policy in favor of the

private resolution of labor disputes through consensual arbitration." Id. (citing NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367, 372 (3d Cir. 1980)).

That same policy was at the heart of the employer's common law preclusion argument in Yellow Freight. Indeed, as the Court observed, the employer's preclusion argument was premised entirely on that policy--that is, the employer argued "that a common law rule of preclusion should be applied here because federal labor policy strongly encourages the private resolution of labor disputes." Yellow Freight, 930 F.2d at 321. In other words, the employer in Yellow Freight claimed that common law preclusion was appropriate because the policy favoring arbitration was so strong that it required that an arbitrator's factual findings be accepted in subsequent Board proceedings.[6]

Here, of course, the federal policy favoring arbitration is entirely absent. Equally important, the Employer has utterly failed to cite any other compelling policy reason for requiring that the findings of the UCB panel and the state court be accepted in subsequent Board proceedings. Accordingly, the Court should reject the Employer's attempt to draw an analogy between the unemployment compensation proceedings in this case and the arbitration proceedings in Yellow Freight.

[6] Ultimately, as shown above, the Court did not need to reach that claim, given its finding that the arbitrator was not presented with all the evidence essential to making the disputed factual finding.

Moreover, even assuming that such an analogy is appropriate, the Employer's common law preclusion argument must fail for the same reason that the argument failed in Yellow Freight. In that case, the Court pointedly observed that it "'made little sense to defer'" to the arbitrator's factual findings "when the arbitrator was not presented with evidence essential to the Board's resolution of the same factual issue in disposing of the unfair labor practice claim." Id. at 322. Similarly, in this case, none of the three decisions in the unemployment compensation proceeding (A 19-23, 371-373, 374-376) even mention a critical fact that the Board found in the unfair labor practice case--namely, Lewis' explicit threat on January 23 to lay off Ferrari for pressing the pay issue. If Lewis made that threat on January 23--as the Board found--then it is untenable to conclude--as the UCB panel and the state court did--that the Employer had already decided on the previous day to terminate Ferrari for insubordination.

Even though, as just shown, none of the three decisions mentioned Lewis' January 23 threat to lay off Ferrari, the Employer points out (Br 33, 35) that the referee's decision explicitly found (A 372) that Ferrari raised the pay issue with Lewis on that day. That evidence, however, does not advance the Employer's position. As the Board observed (A 14 n.1; 374-376), the UCB panel's decision did not mention Ferrari's pay request. As the record shows (A 19-23), the state court's decision also

failed to mention her request. Given those glaring omissions, the Employer is hardly persuasive in claiming (Br 32-36) that the UCB panel and the state court "adequately considered" the critical facts and the issues. Given all of those circumstances, the Board's conclusion (A 11) that the state proceeding is "not binding" is entirely consistent with this Court's Yellow Freight decision.[7]

[7] The Employer does not advance its common law preclusion claim by citing (Br 30, 35-36) NLRB v. Heyman, 541 F.2d 796, 800 (9th Cir. 1976). In that case, the court held that the Board was precluded from finding that a collective-bargaining agreement existed where a federal court had rescinded the agreement in an earlier proceeding. Id. That earlier proceeding involved a suit under Section 301 of the Act (29 U.S.C. § 185), which provides that federal district courts have jurisdiction over suits for contract violations. Given that provision, the Board's jurisdiction "to deal with an unfair labor practice that also violates" a contract is "not exclusive." Smith v. Evening News Association, 371 U.S. 195, 197 (1962). Accordingly, the court in Heyman simply applied common law preclusion to an issue that--unlike the issue here--was not subject to the Board's exclusive jurisdiction.

Equally misplaced is the Employer's reliance (Br 30, 35) on NLRB v. Donna-Lee Sportswear Co., Inc., 836 F.2d 31, 32 (1st Cir. 1987). In that case, the court also held that the Board was bound by an earlier district court ruling that a collective-bargaining agreement did not exist, although that earlier ruling was not the product of a suit under Section 301. Id. at 33-38. Here, of course, a district court's ruling on the validity of a contract is not at issue. Additionally, the court in Donna-Lee Sportswear held that preclusion was appropriate because the contract issue primarily involved "the private interests of two private parties," interests that had been "fully and appropriately adjudicated" in the earlier court proceeding. Id. at 38. Here, as in all other unfair labor practice cases, the Board is acting "in the public interest to enforce public, not private rights." Yellow Freight, 930 F.2d at 321.

Finally, the Employer is no more persuasive in citing (Br 36) University of Tennessee v. Elliott, 478 U.S. 788, 799 (1986). That case discussed issue preclusion in the context of Title VII and the Reconstruction civil rights statutes, not in the context of the Board's exclusive authority to prevent unfair labor practices.

There is also no merit to the Employer's contention (Br 30-32) that the Board should have decided to apply its arbitration deferral policies to state unemployment proceedings. Contrary to the Employer's assertion (Br 30-32), it is plainly rational for the Board to have deferral standards applicable to arbitration proceedings but not to state unemployment proceedings. State unemployment proceedings are not concerned with the same labor relations issues that arise under the Act, and they typically incorporate "different definitions, policies, and purposes from those of the [Act]." Justak Bros. & Co., Inc., 253 NLRB 1054, 1054 n.1 (1981). Accord Bolsa Drainage, Inc., 242 NLRB 728, 728 n.1 (1979). On the other hand, as shown above, arbitrations are "part and parcel of the collective bargaining process itself[,]" and have the "encourag[ement]" of the Act. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960); 29 U.S.C. 151. Accord Yellow Freight, 930 F.2d at 321 ("federal labor policy strongly encourages the private resolution of labor disputes" through arbitration). In view of those dramatic differences, the Board should not be compelled to apply its arbitration deferral policies to state unemployment proceedings.

Finally, there is no merit to the Employer's contention (Br 37-40) that the Board erred in denying the Employer's motion to admit into the record the entire transcript of the UCB hearing. The Board properly denied the Employer's motion as "untimely." (A 11.) Thus, as the Board pointed out (A 11), the UCB hearing

closed on April 10, 1997, months before the Board held its hearing in this case on August 5, 1997. Nevertheless, the Employer did not offer the UCB transcript into evidence at the Board hearing, nor did the Employer seek to have it admitted either while the case was initially before the Board on review, or while the case was before the judge on remand. Instead, the Employer waited until December 23, 1998--after the judge issued his supplemental decision--to file its motion with the Board seeking to have the UCB transcript admitted into evidence.

The Employer's excuse (Br 39) for its delay--that it only realized the relevance of testimony before the UCB after the administrative law judge issued his supplemental decision--is entirely meritless. At the Board hearing, the relevance of evidence related to the UCB proceeding was readily apparent, given that the General Counsel offered the decisions of the referee and the UCB panel as exhibits, offered the UCB form completed by the Employer as an exhibit, and had portions of the UCB transcript read into the record. Indeed, at the Board hearing, the Employer's counsel objected to having portions of the UCB transcript read into the record on the ground that the UCB decision was on appeal to the state court. (A 271.) In those circumstances, the Employer should not be heard to claim that its delay in offering the UCB transcript was justified.

Accordingly, the Board acted well within its discretion in denying the Employer's motion as untimely. See Bolsa Drainage,

Inc., 242 NLRB 728, 728 n.1 (1979) (Board denied employer's motion to reopen record to submit ruling of state unemployment agency because, among other things, employer failed to explain its undue delay in offering it). Accord Fort Vancouver Plywood Co., 235 NLRB 635, 635 n.1 (1978) (Board upheld judge's denial of employer's post-hearing motion to reopen record, given employer's failure to show that its additional evidence was previously unavailable).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the cross-petition for review and enforcing the Board's order in full.

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May 2000

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